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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2018 AP 2318

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ALAN M. JOHNSON,

Defendant-Appellant.

RESPONSE TO PETITION FOR REVIEW

ALAN M. JOHNSON,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

No matter how you look at it, this case is not worthy of this Court's review. An issue-by-issue response to the petition for review follows below, but first, here are three broad reasons why the case as a whole is not one that stands out as deserving of this Court's attention.

First, the Petitioner seeks review of a decision by the Court of Appeals that establishes no new law and announces no policy. In fact, the decision doesn't even decide the case; it simply reiterates what has long been the law in Wisconsin: weighing the evidence is a job reserved for the trier of fact, especially when it comes to deciding questions of reasonableness. In seeking review, the Petitioner is asking this Court to abandon decades of well-established case law (case law that this Court has recently reaffirmed) in favor of a new policy of judicial fact-finding. On their face, the arguments advanced in the petition for review indicate that the petition should be rejected.

In addition, the text of the Court of Appeals' opinion itself indicates that review is not warranted. In its opinion, the Court of Appeals explicitly and repeatedly limited its decision to "the unique facts of this case." *E.g.*, Pet-App. 111, ¶ 21; 120–21, ¶ 41. It made clear that its holdings were not to be applied beyond the bounds of this case. *See, e.g., id.* ¶ 21 n.10. Review of this fact-specific decision would not advance the law at all.

Finally, the procedural posture of the litigation suggests that review is certainly not warranted *now*. The Court of Appeals' decision does not finally decide the case; it merely identifies questions that are for the jury to decide. As the Court of Appeals explained, the Circuit Court's conclusions regarding the reasonableness of Johnson's beliefs and actions were not necessarily wrong—but it is up to the jury, not the Circuit Court, to reach those

conclusions. This case is headed back to trial. Trial may resolve the issues in the Petitioner's favor and obviate any claimed need for review. The Petitioner's displeasure when faced with the prospect of further litigation is understandable, but that is a displeasure equally shared by the parties, and it is not a reason for this Court to grant review.

REASONS FOR DENYING THE PETITION

The Petitioner presents three issues for review. Not one raises an open question under Wisconsin law. Instead, each asks this Court to second-guess the Court of Appeals' application of well-established legal standards to a unique factual scenario.

The first two issues concern the quantum of evidence required to warrant a jury instruction on perfect self-defense and the lesser-included offense of second-degree reckless homicide. The respective legal standards are not up for debate, and the Court of Appeals correctly applied each standard after a fact-intensive inquiry. It did not make new law. It did not establish new policy. It simply explained that whether the defendant reasonably believed that he was privileged to use force to defend himself and whether he acted in utter disregard of human life were questions for the jury, not the court, given the evidence presented in this case.

As for the third issue, which concerns the admission of other-acts evidence, the Petitioner concedes that it does not independently warrant this Court's review.

I. The Court of Appeals faithfully applied the "some evidence" standard to a unique set of facts.

In its opinion, the Court of Appeals first addressed whether the Circuit Court erred in refusing to instruct the jury on the privilege of perfect self-defense. The Court of Appeals recited the applicable "some evidence" standard as enunciated in *State v. Head*, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413, and *State v. Stietz*, 2017 WI 58, 375 Wis. 2d 572, 895 N.W.2d 796:

> "To raise the issue of perfect self-defense, a defendant must meet a reasonable objective threshold." Sufficient evidence must show: "(1) a reasonable belief in the existence of an unlawful interference; and (2) a reasonable belief that the amount of force the person intentionally used was necessary to prevent or terminate the interference." . . . . "The accused need produce only 'some evidence' in support of the privilege of self-defense."

Pet-App. 106–07, ¶¶ 12–13 (quoting *Head*, 2002 WI 99, ¶ 84, and *Stietz*, 2017 WI 58, ¶ 16) (citations omitted). The "some evidence" standard is far from new; this Court developed the standard more than a century ago within the context of lesser included offenses, and it has been applying it to the privilege of perfect self-defense for nearly two decades. *See, e.g.*, *State v. Stortecky*, 273 Wis. 362, 369, 77 N.W.2d 721 (1956).

The Court of Appeals then did just what the "some evidence" standard requires it to do: review the record to determine whether the evidence, viewed in the light most favorable to the defendant, would allow "a reasonable jury [to] find that a prudent person in the position of the defendant under the circumstances existing at the time of the incident could believe that he was exercising the privilege of self-defense." *Stietz*, 2017

WI 58, ¶ 15. This necessarily involves a fact-specific inquiry. For example, the *Stietz* Court spent 25 paragraphs reciting the evidence presented to the jury before concluding, "A reasonable jury could find that a person in the position of the defendant under the circumstances existing at the time of the incident could reasonably believe that the two men were unlawfully interfering with his person and that he was threatening reasonable force in the exercise of his privilege of self-defense." *Id.* ¶¶ 24–60.

In this case, the facts happen to involve Johnson entering KM's house late at night with the hope of gathering evidence of KM's child pornography stash, and KM finding Johnson in the computer room, closing the door (the only means of escape), and then reopening it and attacking Johnson. As the Court of Appeals explained, these "unique facts" raise several layered questions of objective reasonableness: whether a *reasonable* jury could find that Johnson *reasonably* believed that KM was engaged in an unlawful interference, which requires consideration in turn of whether Johnson *reasonably* believed that KM *reasonably* believed that his force was necessary to prevent death or great bodily harm to himself. Pet-App. 111, ¶ 21. Despite the Petitioner's repeated emphasis of the word "unlawful," the Court of Appeals was not presented with the question whether KM's attack would have been lawful under the Castle Doctrine. The question for the Court of Appeals was ultimately one concerning the reasonableness of Johnson's beliefs.

Mindful that "the question of reasonableness of a person's actions and beliefs, when a claim of self-defense is asserted, is a question peculiarly within the province of the jury," *id.* at 113, ¶ 24 (quoting *Stietz*, 2017 W 58, ¶ 18), the Court of Appeals reviewed the evidence and concluded that "[i]t was for the members of the jury—bringing whatever real world experiences they might have—to consider the reasonableness of Johnson's

actions under the circumstances that existed in K.M.'s home shortly after 2:00 a.m. on October 25, 2016." *Id.* In particular, it explained that the evidence would allow a reasonable juror to find "that Johnson reasonably believed that K.M. was going to kill him to prevent going to prison for having child pornography and that Johnson reasonably believed it necessary to discharge his handgun at K.M. to defend himself from an 'imminent danger of death or great bodily harm.'" *Id.* at 114, ¶ 27 (quoting WIS. STAT. § 939.48(2)(a)). In other words, a *reasonable* jury could find that Johnson *reasonably* believed that KM's attack was not rendered lawful under the Castle Doctrine because KM did not *reasonably* believe that his force was necessary to prevent death or great bodily harm to himself.

The Petitioner, in hopes of obtaining a reversal and avoiding a retrial, attempts to reframe the Court of Appeals' decision as one that "condones vigilantism" and "sets a dangerous precedent" by holding that "a person is justified in invading another's home with a loaded weapon and dispensing 'street justice' because he believed that the homeowner was engaged in illegal activity." Pet. at 20, 22. This alarmist description could not be further from the truth. The Court of Appeals made abundantly clear not only that its holding was confined to "the unique facts of this case," Pet-App. 111, ¶ 21, but also that it did not decide whether Johnson's actions were justified at all—it merely decided that the question was one for the jury to answer:

> The circuit court's conclusion that Johnson had no reasonable belief that K.M. was engaged in an unlawful interference was not necessarily wrong; the problem lies in the very fact that it was the circuit court, rather than the jury, that weighed the evidence and resolved the inferences needed to reach that conclusion.

Id. at 111, ¶ 20; *see also id.* n.10.

In sum, the Court of Appeals' ruling on the perfect self-defense instruction is a run-of-the-mill application of the "some evidence" standard, which involves a fact-specific inquiry that asks only whether a reasonable jury could find that the defendant reasonably believed that he was exercising the privilege of self-defense. The issue is a novel one only in the sense that every case presents a novel set of facts. A decision from this Court would do nothing more than reiterate the well-established standard for instructing the jury on the privilege of perfect self-defense. This Court's review is not warranted.

II. The Court of Appeals' decision regarding instructing the jury on second-degree reckless homicide conforms to controlling law.

The Court of Appeals next addressed whether the Circuit Court erred in refusing to instruct the jury on lesser-included offenses. Once again, the Court of Appeals recited the applicable standard: "First, a court must determine whether the crime is a lesser-included offense of the crime charged. . . . Next, a court must consider whether there is a reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense." Pet-App. 116, ¶¶ 31-32 (citing *State v. Muentner*, 138 Wis. 2d 374, 387, 406 N.W.2d 415 (1987)).[1]

[1] On page 23 of its petition, the Petitioner states, "Importantly, and contrary to what the court of appeals' implication, this second step 'involves a *weighing of the evidence* which would be presented to the jury.'" Pet. at 23 (quoting *Muentner*, 138 Wis. 2d at 387) (citation omitted). It's unclear exactly what portion of the Court of Appeals' analysis the Petitioner takes aim at here. The case law is clear that the second step of the lesser-included analysis requires the court to "view the evidence in a light most favorable to the defendant" and to "weigh whether there is a reasonable basis in the evidence for a

The Petitioner does not contest the majority of the Court of Appeals' lesser-included analysis: it agrees that all homicide crimes are lesser-included offenses of first-degree intentional homicide, and it concedes that the jury was properly instructed on second-degree intentional homicide and first-degree reckless homicide. It seeks review of only the conclusion that there is a reasonable basis for a jury to acquit on first-degree reckless homicide and to convict on second-degree reckless homicide.

As the Court of Appeals explained, and as the Petitioner agrees, the sole statutory difference between first-degree reckless homicide and second-degree reckless homicide is the "utter disregard" element. First-degree reckless homicide requires the State to prove that the defendant recklessly caused the death of another "under circumstances which show utter disregard for human life." WIS. STAT. § 940.02(1). Second-degree reckless homicide does not require the State to prove circumstances showing "utter disregard for human life." *See* § 940.06(1).

The utter-disregard standard is "well-established." *State v. Burris*, 2011 WI 32, ¶ 28, 333 Wis. 2d 87, 797 N.W.2d 430. "[T]he fact-finder should consider all evidence relevant to whether a defendant acted with utter

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jury to acquit on the greater offense and to convict on the lesser offense." *State v. Morgan*, 195 Wis. 2d 388, 434, 536 N.W.2d 425 (Ct. App. 1995) (citing *Muentner*, 138 Wis. 2d at 387, and *State v. Davis*, 144 Wis. 2d 852, 855, 425 N.W.2d 411 (1988)); *see also State v. Moffett*, 147 Wis. 2d 343, 352, 433 N.W.2d 572 (1989) ("To justify the submission of this instruction, there must be both reasonable grounds in the evidence for conviction on the lesser offense and acquittal on the greater offense. The evidence is to be reviewed in a light most favorable to the defendant."). The Court of Appeals did just that. *See* Pet-App. 120–21, ¶¶ 40–42. To the extent that the Petitioner's statement implies that courts should weigh the evidence in the prosecution's favor when undertaking the second step of the lesser-included analysis, *that* implication would be directly contrary to binding precedent.

disregard for human life," in other words, the "totality of the circumstances." *Id.* ¶ 38. Factors to consider include

> the type of act, its nature, why the perpetrator acted as he/she did, the extent of the victim's injuries and the degree of force that was required to cause those injuries . . . the type of victim, the victim's age, vulnerability, fragility, and relationship to the perpetrator . . . [and] whether the totality of the circumstances showed any regard for the victim's life.

Id. ¶ 32 (quoting *State v. Edmunds*, 229 Wis. 2d 67, 77, 598 N.W.2d 290 (Ct. App. 1999)). This is the standard used by the Court of Appeals, *see* Pet-App. 118-19, ¶ 37, and it's the standard advanced by the Petitioner, *see* Pet. at 25.

In the end, the Petitioner simply disagrees with the Court of Appeals' application of the well-established utter-disregard standard to the facts of the case. It argues that the Court of Appeals should have only considered "the relationship between the defendant *and the victim*" and that the Court of Appeals erred by considering evidence of Johnson's "concern for non-present third parties." Pet. at 25. Not only is the Petitioner's disagreement over the application of law to fact not the sort of issue deserving of this Court's review, but the Petitioner's argument conflicts with "the well-settled maxim in Wisconsin that 'questions of the weight and reliability of relevant evidence are matters for the trier of fact.'" *Burris*, 2001 WI 32, ¶ 38 (quoting *State v. Fischer*, 2010 WI 6, ¶ 36, 322 Wis. 2d 265, 778 N.W.2d 629). The Court of Appeals did not determine that there was insufficient evidence to support a finding of utter disregard (which was the issue in *Edmunds*). Rather, it merely concluded that a reasonable jury *could* find that there was a reasonable doubt as to whether Johnson acted under circumstances showing an utter disregard for human life. Pet-App 120, ¶ 40.

In addition, the Petitioner's argument ignores the Court of Appeals' separate conclusion that an instruction on second-degree reckless homicide was warranted because a reasonable jury could find that Johnson acted in self-defense, that is, out of concern for *himself*, rather than any third parties. *See id.* ("The evidence also does not mandate a finding that Johnson went to K.M.'s house with the intent to kill K.M. . . . The evidence certainly entertains the argument that had K.M. never entered the computer room, Johnson would never have used the gun, and the shooting, while reckless, was not done with 'utter disregard for human life.'"). From the beginning, the prosecution acknowledged that a reasonable jury could find that Johnson actually believed that the force he used was necessary to defend himself from imminent danger of death or great bodily harm. *See* Pet. at 10 ("The parties agreed that a second-degree intentional homicide instruction was appropriate."). And as discussed above, the Court of Appeals concluded that a reasonable jury could find that Johnson's belief was reasonable. Thus, the Court of Appeals concluded that a reasonable jury could also find that Johnson's actions, although reckless, did not evince an utter disregard for human life.

The Court of Appeals' conclusion is in line with *State v. Miller*, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188.[2] The Petitioner argues that the Court of Appeals misread *Miller* as requiring "that anytime a court instructs a jury on imperfect self-defense, it must always instruct on second-degree reckless homicide." Pet. at 27. But the Court of Appeals did not read *Miller* so broadly. It simply noted that just as in *Miller*, "there is no question in this case that the evidence could support a finding that Johnson acted with an actual belief that he was in imminent danger of death or great bodily harm at the time of the shooting." Pet-App. 119, ¶ 39 n.13. It also

[2] The Petitioner states that "Johnson did not cite the *Miller* decision to the court of appeals." Pet. At 25, n.9. This is not accurate. Johnson cited *Miller* on pages 2 and 3 of his reply brief.

noted that a reasonable jury could find that Johnson's belief was reasonable. It explained that under such circumstances, "it is generally inconsistent to instruct on imperfect self-defense, while at the same time declining a lesser-included instruction on the grounds that there are no circumstances where a jury could fail to infer utter disregard for human life." *Id.* ¶ 39. The Petitioner's attempts to distinguish *Miller* on the facts only underscore the fact that the Court of Appeals' decision does not conflict with *Miller* or any other controlling opinion.

In sum, the Court of Appeals concluded that the evidence supported an instruction on second-degree reckless homicide for two separate reasons: because a reasonable jury could find that Johnson was reasonably acting out of concern for others and because a reasonable jury could find that Johnson was reasonably acting out of self-defense. Neither conclusion warrants this Court's review, as both are grounded in well-established case law that is not challenged by the Petitioner, as applied to "the unique factual circumstances of this case." Pet-App. 121, ¶ 41.

III. The Petitioner concedes that the Court of Appeals' decision regarding other-acts evidence does not warrant this Court's review.

Finally, the Court of Appeals addressed whether the Circuit Court erred in excluding evidence that Johnson found child pornography on KM's computer. *See* Pet-App. 122–27, ¶¶ 43–51. An in-depth analysis of this issue is unnecessary because the Petitioner expressly concedes that it does not independently warrant this Court's review. *See* Pet. at 29. Why not? Because the Court of Appeals identified the correct standard and applied it to unique facts—and the Petitioner simply disagrees with the conclusion that the Court of Appeals reached based on those facts. Of course, that same description applies

to the first two issues identified by the Petitioner, and that's why review is not warranted on any of the issues raised in the petition.

CONCLUSION

The petition for review fails to demonstrate that any of the criteria for this Court's review are satisfied. This case presents no need for establishing or changing a policy within the Court's authority, nor does it present a need for clarification or harmonization of the law of jury instructions; and the Court of Appeals' decision creates no conflict with controlling law. The petition should be DENIED.

Dated at Madison, Wisconsin, this 19th day of August, 2020.

Respectfully submitted,

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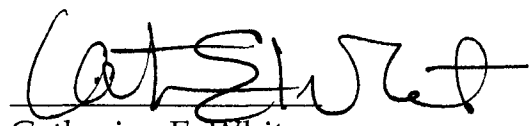
CERTIFICATION

I certify that this response conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (d) and 809.62(4) for a response produced using proportional serif font. The length of this response is 3217 words.



Catherine E. White

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) and 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of WIS. STAT. §§ 809.19(12) and 809.62(4)(b).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on the opposing party.

Catherine E. White